

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO. 785 OF 2016
WITH
CIVIL APPLICATION NO. 14643 OF 2016
(for stay)

Mukesh s/o Haribhau Gondhale,
Age : 62 years, occup. Milk Dairy,
R/o House No. 3452, City Survey
No. 2659, A/2 & 2629B,
Church Road, Nistane Wada,
Ahmednagar, Tq. and Dist.
Ahmednagar

.. Appellant/orig. Third
Party-applicant no.1

versus

- 1) Rajendra Ratilal Munot,
Age : 60 years, occup. Business,
R/o Vijaya Residency, Chitale Road,
Ahmednagar
- 2) Kailash Balasaheb Nistane,
Age : 50 years, occup. Milk Dairy,
- 3) Vinod Kailash Nistane,
Age : 20 years, occup. Milk Dairy,
Nos. 2 and 3 R/o Nistane Wada,
Church Road, Ahmednagar
- 4) Suvarna Yashwant Namde,
Age : 28 years, occup. Household,
R/o Namde Chawl, Mohan Nagar,
Chinchwad, Pune
- 5) Rani Ganesh Chawandake
Age : 25 years, occup. Household,
R/o Bhimnagar, Gandhinagar,
Kopargaon, Tq. Kopargaon,
Dist. Ahmednagar
- 6) Pallavi Sudhakar Doiejad,
Age : 22 years, occup. Household,
R/o Gawaliwada, Daund,
Tq. Daund, Dist. Pune

- 7) Rajendraprasad Omprasad Sharma, .. Respondents/
Age : 43 years, occup. Labourer, Resp.No.1 orig.
R/o House No. 3453, City Survey plaintiff, Resp.
No. 2659 A/2 & 2629B, Church Road, Nos.2 to 6 orig.
Nistane Wada, Ahmednagar defts.,Resp.No.7
orig.third party-
applicant no.1
- Mr. G. D. Nagode, Advocate for appellant
Mr. A. S. Bajaj, Advocate for respondent no.1

CORAM : SUNIL P. DESHMUKH, J.
DATE : 1st March, 2017

ORAL JUDGMENT :

1. Aggrieved by judgment and order delivered by District Judge - 7, Ahmednagar, dismissing regular civil appeal no. 434 of 2015 on 26-10-2016 and thus confirming the order of dismissal of application under Exhibit - 39 passed by executing court [Civil Judge, Senior Division, Ahmednagar] on 04-11-2015, original third party no. 1 is before this court under present second appeal.
2. Heard learned counsel for the appellant and learned counsel for respondent no.1 - original plaintiff - decree holder.
3. Learned counsel for appellant submits that an opportunity ought to have come the way of appellant to prove his case of being in legitimate possession of suit property having regard to the record that had been placed before the executing court in the form of rent receipts, ration card etc.

4. Since the application Exhibit - 39 had been decided by executing court without giving opportunity dismissing the same under order dated 04-11-2015 referred to hereinabove, regular civil appeal no. 434 of 2015 had been preferred by present appellant and present respondent no. 7. The appellate court as well, according to learned counsel for the appellant, did not consider the matter in accordance with the scheme reflected under rules 97 to 103 of Order XXI of the Code of Civil Procedure, 1908 and had dealt with the appeal summarily and has erroneously dismissed the same.

5. Learned counsel refers to decisions relied on during the course of hearing in support of case of the appellant and submits that the matter be remanded giving opportunity to the appellant to adduce evidence.

6. Learned counsel submits that the proceedings initiated under the application Exhibit - 39 by appellant and respondent no. 7 will have to be treated as suit and this treatment being not given to the proceedings, it has caused prejudice to the appellant.

7. Learned counsel Mr Bajaj appearing on behalf of respondent no. 1- decree holder opposes the request on behalf of the appellant for remand. He submits that the appellant is a

brother-in-law of the judgment debtor and as such is only a stooge.

8. Learned counsel goes on to submit that whatever record has been produced has been duly examined by the two courts hitherto and the courts have found the same to be not authentic. In any case, learned counsel submits, the entire record sought to be relied on, on behalf of the appellant, is a record of the period subsequent to institution of the suit. He further refers to that the decree holder has produced sufficient documents showing that the documents which the appellant relies on are manufactured and are not reliable.

9. He further submits that the recourse the appellant seeks is available to the persons who can legitimately claim possession over suit property. He points out that while suit had been instituted in 2005, the judgment debtors - defendants had filed their written statement. The written statement not by semblance reflect upon that there is some person other than the defendants, who could be said to be in possession of suit property. He submits that recourse to the treatment pursuant to rules 97 to 103 under order XXI of the Code of Civil Procedure is not available for frivolous claims and thus purports to support judgments by the two courts.

10. With the assistance of learned counsel on either side after going through the judgments of the two courts hitherto, it appears that all the relevant considerations as would be required in the facts, circumstances and law appear to have been taken into account while decisions were rendered by the two courts.

11. The two courts have considered nature of the documents filed on record by the appellant and appear to have found that those would not constitute sufficient material to let the claim receive treatment to the matter pursuant to rules referred to hereinbefore. The appreciation as has been reflected from the observations of the appellate court and those appear and occur in paragraphs no. 11, 12, 13 and 15 of its order and it would be worthwhile to reproduce the same hereinbelow.

" 11. Perusal of para no. 2 of plaint, reflects that there is a specific pleading that one room premises each was in possession of defendant nos. 3 to 5 as tenants which is situated at ground floor of House No. 3452 and one room premises each which is situated at first floor of said house was in possession of defendant nos. 6 to 8. Remaining portion of said suit house property is in possession of defendant nos. 1 and 2. That means on the date of filing of suit there is no pleadings regarding so called tenancy rights of present appellants.

12. Special civil suit no. 158 of 2006 decided on 22/07/2009, Regular Civil Appeal No. 580/2012 (First appeal No. 2910/2009) decided on 19/09/2014 and Second Appeal No. 32/2015 decided on 14/07/2015. These appellants have not made any grievance regarding their possession till filing of application Exh. 39 on 19/08/2014. Thus, it appears that third party applicants have filed present application by showing cause of action as on 12/05/2014.

13. Appellants filed and relied on list of documents at exh. 42 and Respondent no. 1/decree holder filed and relied on list of documents at exh. 57/c. After perusal of ration card filed by Appellant no. 1 Rajendraprasad Omprakash Sharma, shows that it being new ration card which is issued on 29/10/2007 and address on it is shown as 'Churchgate Road, in front of Chand Sultana School, Nistane Wada.' Perusal of driving licence of Appellant no. 1 shows that date of issue of said driving licence is 11/0/2/2008. Perusal of addhar card of Appellant no. 1 shows no date of its issuance. Perusal of Election Card of appellant no. 1 shows date of issue as 17/02/2009. Thus perusal of these above mention four document reflect that all those documents are issued after the date of filing of the said suit.

15. Perusal of Ration Card produced by Appellant no. 2 Mukesh Haribhau Gondhale, reflects that the said ration card bears no. 320669 with code no.1077 issued on 15/07/2011. Perusal of Adhar card of Appellant no. 2 does not show date of its issuance. Appellant no. 2 has produced four rent receipts issued by Respondent no. 2/Judgment-debtor no. 1 Kailash in the year 2001, 2002, 2005 and 2006. Perusal of the said four rent receipts show that house rent receipts of year 2001 and 2006 are having house no. as 3452B and house rent receipts of year 2002 and 2005 are having house no. 3452A. However, dispute is regarding house property bearing no.3452. Thus, there is a basic dispute regarding authenticity of the documents as the Respondent no. 1/decree-holder has produced on record Schedule-A from Nagar – Parishad, Ahmednagar regarding suit property where the names of tenants have been shown in the year 2001. On perusal of documents Exh. 53/3 reflects that Schedule-A is of 18/07/2001 wherein the names of other tenants including Ganpat Ramchandra Raut (defendant no.5) and Kishor Sarolkar (defendant no.8) are appearing but names of Appellants are not appearing. Thus, it means that documents produced by both Appellants are not sufficient to draw inference that prima – facie material is in their favour to commence inquiry contemplated under Order 21, Rule 97 of the Civil Procedure Code. After perusal of all material produced by Appellants and the material produced by Respondent no.1/decree-holder, this court does not find any substance in appeal for commencement of inquiry contemplated under Order XXI, Rule 97 of The Civil Procedure Code. "

12. Having regard to aforesaid, it does not appear to be a case wherein it can be said that the situation calls for adjudication as

is envisaged under rules 97 onwards of order XXI of the Code of Civil Procedure. Both the courts have considered the material, appreciated the same and have concurred on the nature of the same which does not appear to be not adhering to the record.

13. In the circumstances, it would not be said that the second appeal gives rise to consideration of any question which can be said to be substantial in nature to be entertained pursuant to section 100 of the Code of Civil Procedure.

14. Second appeal, as such, stands dismissed.

15. Civil application does not survive and stands disposed of accordingly.

SUNIL P. DESHMUKH,
JUDGE

pnd